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In The

Supreme Court of the United States

October Term, 1986

JANIS M. LAWRENCE,

Petitioner,

vs.

ELIZABETH DOLE, Secretary of Transportation, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. May a trial court's ultimate conclusion of non-discrimination in an employment case be upheld as grounded in a credibility determination, where the trial court found the prima facie case to have been rebutted by reasons merely inferable from the record, without the employer offering testimonial evidence as to the actual reason?

2. Whether failure to comply with requirements of the Privacy Act is rendered nonwillful or unintentional, for remedy purposes, by the victim's pre-litigation attempt to correct those violations.

3. Whether Rule 52(a) was complied with when the court of appeals had to read the district court opinion as covering a subject which the opinion clearly stated it was not covering?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Janis M. Lawrence respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on December 24, 1986.[1]

1. Ms. Lawrence was the appellant in the court of appeals. The appellees were Elizabeth Dole (Secretary of Transportation) and Harold Shear (Maritime Administrator).

OPINIONS BELOW

The opinion of the court of appeals, which is unreported, appears in the appendix at Pet. App. 1a.[2] The opinion of the district court, which is also unreported, appears in the appendix at Pet. App. 16a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on December 24, 1986. A timely petition for rehearing was denied on February 27, 1987, and this petition for certiorari was filed within 90 days of that date. This Court is given jurisdiction to review the judgment of the court of appeals by 28 U.S.C. § 1254.

STATUTES INVOLVED

42 U.S.C. § 2000e; 5 U.S.C. § 552a; 29 U.S.C. § 206(d); Fed. R. Civ. Proc. 41(b) and 52(a).

STATEMENT OF THE CASE

Ms. Lawrence's suit in the district court sought relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; the Equal Pay Act of 1963, 29 U.S.C. § 206(d); and the Privacy Act, 5 U.S.C. § 552a.[3] An error worthy of this Court's review was committed with respect to each of these causes of action.

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2. "Pet. App." refers to the appendix accompanying this petition. Other references will be made to "Jt. App.", which is the joint appendix of the parties in the court of appeals proceedings, and to the trial transcript and exhibits.

3. The district court had jurisdiction under 42 U.S.C. § 2000e-5(f)(3), 29 U.S.C. § 217, and 5 U.S.C. § 552a(g), respectively.

A. Title VII

Ms. Lawrence challenged a series of adverse personnel decisions as being discriminatorily motivated.[4] The district court found that Ms. Lawrence had made out a prima facie case of discrimination or reprisal with respect to each of them,[5] but then found that as to each the agency had successfully rebutted the inference of discrimination created by the prima facie case and that Ms. Lawrence had not discredited the rebuttal (Pet. App. 25a-26a). The court therefore entered judgment for the agency (Pet. App. 58a). Deeming the trial court's judgment to be one based on credibility, the court of appeals found Ms. Lawrence to have not met the heavy burden of showing it to be clearly erroneous (Pet. App. 6a-7a).

The conflict that needs to be resolved between the D.C. Circuit's interpretation of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and the interpretation made by the Fifth and Sixth Circuits, is exemplified in the handling of Ms. Lawrence's complaint regarding her 1977 attempts to be promoted to GS 12. Only the facts related to that portion of the Title VII dispute will, therefore, be set out here or analyzed in the argument.

Ms. Lawrence claimed that in March 1977 her immediate

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4. Initially sex discrimination and then sex discrimination plus reprisal. The reprisal was for her participation as named plaintiff and class representative in *Harrison v. Lewis*, 559 F. Supp. 943 (D.D.C. 1983), *aff'd, except for determination of relevant time period in defining the class entitled to relief*, No. 83-1678 (D.C. Cir., March 1, 1984) (unpublished).

5. This finding was made twice—first, when the court denied the agency's Rule 41(b) motion for dismissal at the close of Ms. Lawrence's evidence (Jt. App. 79a), and again in its memorandum decision (Pet. App. 25a). [The denial of a Rule 41(b) motion implies a finding that the plaintiff made out a prima facie case. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n. 4 (1983)].

supervisor, Richard Lewis, and second-level supervisor, Stephen Orosz, improperly denied her promotion to GS 12[6] and that then, after being reassigned to a new supervisor, Howard Norseth, in August 1977 (Jt. App. 210), the promotion was still delayed another five months until January 1978 (Jt. App. 31). Misconstruing *McDonnell Douglas,* the trial and appellate courts failed to require the agency to truly articulate a reason for either of these personnel decisions.

(i) Original Denial of Promotion to GS 12

Mr. Orosz testified on behalf of the agency.[7] He stated that during the period April through October 1975 (*i.e.*, well prior to her earlier promotion to GS 11) Ms. Lawrence had complained overmuch about a decision to contract out the so-called "MATS" project (Pet. App. 30a-31a). More directly related in time to the 1977 GS 12 promotion denial decision, he testified that shortly before that decision Ms. Lawrence had begun refusing to perform any work whatsoever and that she had demonstrated an inability to work with her colleagues (Jt. App. 191).

Mr. Orosz did not specify which, if any, of these three alleged deficiencies led to his decision to deny the promotion.

Ms. Lawrence responded to each of the three criticisms. On the last, she had a GS 14 co-worker corroborate her testimony that Mr. Orosz repeatedly, loudly, and publicly shouted to Ms.

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6. Ms. Lawrence had been promoted to GS 11 in March 1976 and was, therefore, eligible for promotion to GS 12 in March 1977 (Jt. App. 31).

7. Mr. Lewis did not testify. The agency attempted to introduce a lengthy memorandum from him, warning Ms. Lawrence about alleged performance deficiencies. The court refused to allow the exhibit as evidence "for the truth of the statements in the warning," but did allow it for "The fact of the warning." (Jt. App. 197a).

Lawrence such things as "I'm going to get you, baby," and "I'm going to fire your ass;" that at a staff meeting Mr. Orosz directed the staff to not associate with Ms. Lawrence; and that Mr. Orosz also held individual meetings with the members of the staff telling them to treat Ms. Lawrence as a pariah (Jt. App. 45, 199, 353). The agency offered no evidence to contradict or explain this testimony.

Ms. Lawrence countered the charge that she had refused to perform any assignments first, by arguing out that the trial was the first time anyone had even made that claim, and, second, by producing a list of 13 assignments made and completed during the period referred to by Mr. Orosz (Jt. App. 348, 350, 352, 353). The agency did not have Mr. Orosz specifically deny that Ms. Lawrence had properly handled each of the assignments she identified, nor did Mr. Orosz identify any other specific assignment she had failed or refused to perform.

As to the claim that, prior to her earlier promotion to GS 11 she had had difficulty dealing with a particular contractor, Ms. Lawrence simply explained her side of the story (Tr. 6/24 at 57-68; Jt. App. 351-353).

The court apparently inferred that the only criticism intended by Mr. Orosz as his reason for denying Ms. Lawrence a promotion was the one concerning relations with a contractor in 1975, silently dismissing those criticisms of misconduct close in time to the promotion as mere irrelevancies:

> Plaintiff's profferred proof as to pretext first attacks Orosz's credibility. [Citation to record omitted.] The Court, however, finds Orosz's testimony as to problems in the MATS program credible.

(Pet. App. 32a).

(ii) Subsequent Delay in Promotion

In August 1977 Ms. Lawrence was transferred to Mr. Norseth's supervision (Jt. App. 210). She was finally promoted to GS 12 five months later, in January 1978 (Jt. App. 31). She claimed sex discrimination and reprisal in the delay in promoting her. As with the original promotion denial, the court found that a prima facie case of discrimination, giving rise to a presumption of discrimination, had been made out (Pet. App. 25a).

Ms. Lawrence testified without contradiction that at the time Mr. Norseth told her that her promotion would have to await the outcome of a "desk audit." (Jt. App. 46a). Without denying he had made this statement, Mr. Norseth admitted at trial that it could not have been true (Jt. App. 156-157). Mr. Norseth was not asked to state what the true reason in fact was. The court concluded that there was no reason for Mr. Norseth or anyone else to testify on this point, as his true reason could be simply inferred from the record:

> [P]laintiff argues that the five month delay of her promotion after her transfer to the new division was unreasonable and retaliatory. PPFF at ¶ 14B. Plaintiff argues that Norseth never articulated "evaluation" as the reason for the five month delay in promotion. PPFF at ¶ 15. This hyper-technical argument is adequately answered by the fact that the requirement for a supervisor to determine an employee's abilities before recommending promotion is in evidence. Stip. No. 27. The five month evaulation period was reasonable, ...

(Pet. App. 32a-33a).[8]

8. The "hyper-technical argument" was that the Fifth and Sixth Circuits (Cont'd)

(iii) Totality of the Delay

After finding specific legitimate reasons for the promotion denial by Orosz and Lewis, and the promotion delay by Norseth, the court then added reasons apparently applicable to both:

> The five month evaluation period was reasonable, and the fact of the warning, grievance, settlement and transfer adequately justify any overall delay in plaintiff's promotion. Plaintiff has failed to demonstrate by a preponderance of the evidence that defendant's articulated reason for any delay in promotion from GS-11 to GS-12 is pretextual.

(Pet. App. 33a).

No one had testified that Ms. Lawrence had been denied a timely promotion because there had been a warning, or because she had filed a grievance, or because the grievance had been settled,[9] or because she had transferred to Mr. Norseth's division.

(iv) Affirmance by Court of Appeals

On appeal, Ms. Lawrence's sole argument was that under this Court's cases, a prima facie case of discrimination can be

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(Cont'd)
had correctly held that the employer could not rebut a prima facie case of discrimination unless its witnesses identified a specific nondiscriminatory reason for the personnel decision. This argument was, of course, emphasized at the court of appeals as well.

9. The grievance settlement had included the imposition of disciplinary action against Mr. Orosz for his misconduct towards Ms. Lawrence (Jt. App. 203).

rebutted only by the employer presenting evidence that identifies a specific nondiscriminatory reason for the challenged action. The court of appeals, however, treated the case instead as one in which there had been proper rebuttal and the trial court had chosen between the explanations of the two parties:

> [A] resolution of the Title VII issues turn on an assessment of the credibility of conflicting testimony. *See id.* Basically, the District Court found more credible appellee's explanation of the disputed events and their causes. It found that appellant suffered various adverse consequences at her job because of her inability to work with her colleagues—not because of her sex. The Supreme Court has recently addressed our duty as an appellate court in situations like this one: "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent can virtually never be clear error." *Anderson v. City of Bessemer City,* 105 S. Ct. 1504, 1513 (1985). The present case is certainly not one of those few in which there is extrinsic evidence that renders the District Court's credibility determination clearly erroneous.

(Pet. App. 7a).

B. Privacy Act

The district court correctly found the agency had violated the Privacy Act, 5 U.S.C. § 552a, by secretly maintaining memoranda critical of Ms. Lawrence for over a year and then using

them as the basis of an adverse personnel action (a written admonishment to Ms. Lawrence) (Pet. App. 69a-72a). The court ordered expungement of the written admonishment and all related records (Pet. App. 73a-74a, 76a).

However, the court denied Ms. Lawrence damages and attorney fees, reasoning that the very fact that she later challenged the accuracy of the criticisms against her (*see* Jt. App. 358-371) somehow rendered the agency's misconduct unintentional and nonwillful:

> In her supplemental filing, plaintiff asks for damages in the amount of $1000 under section 552a(g)(4). This section, however, requires the court to find that the agency's violation of the Privacy Act was willful or intentional. Such a finding is not justified in this case. While it was a violation of the Privacy Act for the agency to rely, in the making of an employment decision adverse to plaintiff, upon the personal notes not timely incorporated in the employee's file, the agency did give plaintiff an opportunity, albeit belatedly, to respond to her accusers. This fact, while not curing the Privacy Act violation, militates against a finding that the violation was willful or intentional.

(Pet. App. 72a-73a).[10]

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10. Ms. Lawrence was first given the secret memoranda attacking her at the time she was given the written admonishment (Jt. App. 359), adopted by Ms. Lawrence as her testimony under oath (Jt. App. 73). The belated opportunity to respond to her accusers was taken advantage of in the form of a grievance, relying on the Privacy Act, seeking expungement of the written admonishment and the related documents (Jt. App. 358-371).

The court of appeals affirmed without substantive discussion:

> The District Court denied plaintiff damages for appellee's violation of the Privacy Act because it found that the violation was not intentional. Nor was this finding clearly erroneous in light of the evidence in the record.

(Pet. App. 15a).

C. Equal Pay Act Findings

Ms. Lawrence made claims under the Equal Pay Act, 29 U.S.C. § 206(d)(1), for two distinct periods. She claimed entitlement to GS 14 pay for the period October 1974 through October 1976, and to GS 15 pay for the period September 1979 through July 1982. The GS 14 claim was rejected by the court on statute of limitations grounds (Pet. App. 51a) and that rejection was not challenged on appeal. The GS 15 claim was rejected by the court on the government's Rule 41(b) motion at the close of Ms. Lawrence's evidence (Jt. App. 79a-79b) and a motion to reconsider was denied in the court's memorandum and order (Pet. App. 56a).

On appeal, Ms. Lawrence complained of the court's failure to issue findings of fact and conclusions of law regarding the GS 15 Equal Pay Act claim, as required by Rules 41(b) and 52(a), Federal Rules of Civil Procedure. The court of appeals found that the district court's memorandum had not differentiated between the GS 14 claim (covering the 1974 through 1976 period) and the the GS 15 claim (covering the 1979 through 1982 period), and thus did constitute findings concerning the later claim:

> Given these explicit references to plaintiff's GS-15 claim in the District Court' discussion of the Equal

> Pay Act, we conclude that the findings-of-fact and conclusions-of-law which are contained in that discussion apply to both the GS-14 and the GS-15 claims.

(Pet. App. 13a).

The court of appeals conceded that the introduction and the conclusion of the district court's Equal Pay Act discussion said it dealt with the GS 14 (1974-76) claim and not the GS 15 (1979-82) claim:

> The District Court's memorandum opinion contains a section entitled "Equal Pay Act." At first glance this section might be read as applying only to appellant's claim regarding GS-14 work, since it begins: "In addition to the Title VII claims, plaintiff seeks relief under the Equal Pay Act. *Specifically, she seeks pay at the GS-14 level for the two years she worked on the MATS project,*" Memorandum Opinion at 16 (emphasis added), and ends: *[P]laintiff also seeks reconsideration of the Court's prior ruling dismissing her GS-15 Equal Pay Act claim. This issue was properly decided and the accompanying order will deny plaintiff's motion for reconsideration. Id.* at 19 (citation omitted) (emphasis added).

(Pet. App. 9a).

The court concluded that the text in between this introduction and conclusion was intended to apply equally to the 1974-76 claim and the 1979-82 claim, because the district court at three points referenced what the appeals court thought were Ms. Lawrence's arguments on the latter claims:

> There is, however, other language in the Equal Pay Act section that makes evident that the District Court's findings and conclusions contained in that section encompass the GS-15 as well as the GS-14 claim. For example, "proceed[ing] to the merits of the plaintiff's Equal Pay Act claim," the District Court stated: "Plaintiff argues [that] 'she was performing work requiring equal skills, efforts, and responsibilities at GS-14's and *GS-15's*.' " *Id.* at 17 (quoting Plaintiff's Proposed Findings of Fact at 63) (emphasis added.) The District Court then goes on to cite plaintiff's "Memorandum of Points and Authorities in Support of Motion for Reconsideration of Ruling Dismissing Plaintiff's *GS-15* Equal Pay Act Claim," *Id.* (emphasis added), in saying that "[p]laintiff offers evidence as to allegedly 'representative' projects but she does not offer specific evidence that compares her *entire* job with the *entire* job of a higher paid male employee." *Id.* (emphasis in original). And again, the District Court cites "Plaintiff's Reply to Opposition to Motion for Reconsideration of Dismissal of *GS-15* Equal Pay Act Claim" to reject plaintiff's for additonal discovery on the issue. *Id.* (emphasis added). Given these explicit references to plaintiff's GS-15 claim in the District Court's discussion of the Equal Pay Act, we conclude that the findings-of-fact and conclusions-of-law which are contained in that discussion apply to both the GS-14 and GS 15 claims.

(Pet. App. 11a-13a).[11]

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11. The appeals court's first reference did not support its interpretation (Cont'd)

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD RESOLVE THE INTER-CIRCUIT DISPUTE OVER WHETHER A PRIMA FACIE CASE OF DISCRIMINATION IS REBUTTED BY THE MERE INTRODUCTION OF EVIDENCE FROM WHICH THE TRIER-OF-FACT CAN INFER A NONDISCRIMINATORY REASON FOR THE PERSONNEL ACTION, AND HOLD THAT THE EMPLOYER MUST INTRODUCE DIRECT EVIDENCE OF A NONDISCRIMINATORY REASON.

In *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), this Court established the "order and allocation of proof," 411 U.S. at 800, in individual employment discrimination cases. Petitioner asks this Court to settle a vexing question concerning the employer's burden of production in an employment discrimination case.[12]

(Cont'd)
at all, for the sentence quoted in the district court's memorandum explicitly referred only to the 1974-76 period:

> Ms. Lawrence seeks back pay at the GS 14 level for the two years during which she worked on the MATS project—October 1974 through October 1976—based on the fact that she was performing work requiring equal skills, efforts, and responsibility as male GS 14's and 15's.

Plaintiff's Proposed Findings of Fact at 63.

The other two references cited by the court of appeals, however, are in fact to arguments on the 1979-82 Equal Pay Act argument.

12. The Court has already resolved a number of other issues arising out (Cont'd)

McDonnell Douglas held that the plaintiff must first make out a prima facie case of discrimination (which would vary depending on the type of personnel action challenged); the employer would then have to "articulate some legitimate, nondiscriminatory reason for the employee's rejection," 411 U.S. at 802; the plaintiff would in turn have the obligation to show the articulated reason to be a mere pretext for discrimination, 411 U.S. at 804.

The circuits are divided over whether a prima facie case of employment discrimination can be rebutted without a witness who testifies why, in fact, the challenged personnel decision was made,[13] or whether the court can infer that if a nondiscriminatory reason was available to the employer, the employer did rely on that reason rather than discrimination.

This Court's opinions have established the outer limits of

(Cont'd)
of *McDonnell Douglas*. These include the purpose, and hence, the constituents, of the prima facie case, *Teamsters v. United States*, 431 U.S. 324, 358 n. 44 (1977) (dictim), and *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); and the role played by the prima facie case and the rebuttal in cases which have been fully tried, *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). As noted below, the Court has also twice addressed the employer's rebuttal burden—in *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The previous cases, however, have not brought before the Court the explicit quesion whether the issue-clarifying role of the employer's rebuttal burden can be met without a witness identifying the employer's actual reason for the personnel decision.

13. The separate opinion in *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), referred to this as "an executive tak[ing] the witness stand to 'articulate' his reason" for the employment action. 439 U.S. at 28. To the same effect would be stipulations, *Davis v. Weidner*, 596 F.2d 726 (7th Cir. 1979); the record of earlier proceedings, *Ekanem v. Health and Hosp. Corp.*, 724 F.2d 563 (7th Cir. 1983); and other exceptions to the hearsay rule.

the defendant's burden. First, it is clear that the defendant must introduce some evidence; "[T]he defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 9 (1981). Second, the evidence must be of sufficient weight as to create a genuine issue of fact. *Burdine*, 450 U.S. at 254. Third, the evidence need not actually persuade the trier of fact. *Sweeney*, 439 U.S. at 25; *Burdine*, 450 U.S. at 254.

What is left unclear—and what has been dealt with inconsistently by the lower courts—is the extent to which the trier of fact can presume that an available nondiscriminatory reason was the employer's actual reason. Put another way, is the employer's burden met by merely introducing evidence that a nondiscriminatory explanation was available, with the court assuming this was the employer's reason and without the employer's responsible official testifying that indeed it was his or her actual reason?[14]

The subsequent cases which have presented this Court an opportunity to expand or explain the *McDonnell Douglas* analysis[15] have all followed its basic paradigm: the plaintiff has made out a prima facie case, the defendant's officers have testified why they made the challenged decision, and the plaintiff has had an

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14. Thus, using the facts in *McDonnell Douglas v. Green* itself, the question is whether the employer would meet its rebuttal burden merely by putting into the record evidence that plaintiff Green had committed the misconduct, with the trier of fact then inferring that the misconduct was the reason for the job denial, or whether the employer, in addition, had to make a statement in evidence identifying the misconduct as the reason.

15. These cases are *Teamsters v. United States*, 431 U.S. 324 (1977); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

opportunity to discredit the defendant's articulated reason. Ms. Lawrence's case, however, is typical of cases in the District of Columbia Circuit, in which the employer fails to provide direct evidence of the actual reason for the personnel decision but the court, one way or another, finds the decision to have been legitimate and nondiscriminatory.

A. The District of Columbia Circuit practice of inferring nondiscriminatory reasons from the record is inconsistent with the Fifth and Sixth Circuit practice of requiring the employer to identify, through a witness, what nondiscriminatory reason is being relied on.

Both the Fifth and the Sixth Circuits have held that the employer's witnesses must identify what specific reason they had for the challenged personnel action. In the leading Fifth Circuit case, the court expressly rejected the claim that placing in the record evidence of a possible nondiscriminatory reason meets the employer's articulation burden:

> Appellant next argues that the record is replete with nondiscriminatory reasons for selecting Nancy Gibbon for the position and for paying her more than either offered or sought by Mrs. Uviedo. . . . It is certainly possible that these facts could be legitimate reasons for promoting one employee over another or for paying one employee more than another. The difficulty here, however, is that defendant never articulated to the magistrate that these *were in fact* the reasons for the particular challenged action.
>
> * * *
>
> It is beyond the province of a trial or reviewing court to determine—after the fact—that certain

> facts in the record might have served as the basis for an employer's personnel decision.

Uviedo v. Steve's Sash & Door Co., 738 F.2d 1425, 1429-30 (5th Cir. 1984) (emphasis in original).

On similar facts, the Sixth Circuit also made clear that there must be direct evidence of the actual reason:

> NCI's stated reason, simply put, explains only that persons to whom the employment decision was delegated did not want him. Rowe's former foreman may well have made his decision not to have Rowe rehired because of his belief that the plaintiff's work record was unsatisfactory. On the other hand, he may have made that decision because he personally disliked black people or for any number of reasons. The speculation that is required to determine the precise question is illustrated by the district court's memorandum opinion which refers to the evidence that Rowe's foreman had once or twice admonished him to stay at his post of duty and notes that "This could have provided a viable reason for Mr. Rowe's failure to be requested for rehire the second time around." While we agree that such a reason *could* constitute a legitimate reason, no evidence was introduced at trial to demonstrate that it *was* the reason given by NCI for its refusal to rehire Rowe.

Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 96-7 (6th Cir. 1982).

In the District of Columbia Circuit, in contrast, the employer's burden is met merely by "elicit[ing] plausible non-discriminatory

reasons'' for the action, without the responsible management officials actually testifying which, if any, of the elicited plausible reasons was the actual reason:

> As explained above . . . plaintiff did establish a prima facie case of reprisal. . . . During cross-examination of Mitchell, the defense elicited plausible non-discriminatory reasons for each of these actions. The defense brought out the fact that the shift to lower performance ratings for Mitchell coincided not only with Mitchell's decision to join the EEO committee, but also with a change in Mitchell's job responsibilities. These new responsibilities included three projects . . . Mitchell conceded that none of these projects was completed by the assigned deadline. The defense also showed during cross-examination that some of the projects were handed over to others after Mitchell had worked on them. . . .
>
> * * *
>
> Upon conclusion of the cross-examination of Mitchell, plaintiff's counsel had an opportunity to rebut the nondiscriminatory reasons brought out by the defense. On redirect, Mitchell testified that he believed the time allotted for the assignments was insufficient, and that he had complained about the deadlines to his supervisor, but that unlike other employees Mitchell was not allowed to negotiate for extension of the deadlines. . . .
>
> At this point, the district court was positioned to determine whether Mitchell had carried the ultimate burden of persuasion on the reprisal claim. The tendered nondiscriminatory reasons for the

> allegedly retaliatory actions were squarely before the court. Plaintiff had attempted to show that the reasons advanced by the defense were pretextual. The district court did not find plaintiff's rebuttal persuasive, and plaintiff did not suggest that he had further evidence on point. The district court's ultimate finding of fact on the reprisal claim is not clearly erroneous.

Mitchell v. Baldridge, 759 F.2d 80, 88 (D.C. Cir. 1985).

Cuddy v. Carmen, 762 F.2d 119 (D.C. Cir. 1985), presents a variation on the *Mitchell* theme.[16] There, the employer's selecting official could not recall considering the plaintiff's application. 762 F.2d at 125. The district court held the defendant had rebutted the prima facie case of discrimination through two alternative explanations: that the selecting official had considered the plaintiff's application and determined him to be less qualified than the successful candidate; and that the selecting official had not considered the plaintiff's application, so that the rejection stemmed from a mere bureaucratic error rather than discrimination. 762 F.2d at 127. The court of appeals found that if, as the selecting official testified, he had not even considered plaintiff's application, plaintiff would have been entitled to prevail in the lawsuit (there being no evidence that the bureaucratic error itself was nondiscriminatory). 762 F.2d at 128-9. Although the appeals court noted that the district court's alternative finding that the plaintiff was rejected for a different reason than had been testified to by the selecting official was supported only by "a somewhat precarious tower of inferences," the court nevertheless affirmed the judgment on the ground that the plaintiff

16. *Mitchell* and *Cuddy*, both decided in 1985, silently overruled the one D.C. Circuit case which is consistent with *Uviedo* and *Rowe: Lanthear v. Prokop*, 703 F.2d 1311 (D.C. Cir. 1983).

had not sufficiently discredited this hypothetical reason. 762 F.2d at 127.

Similarly, in the present case, the employer "elicited plausible nondiscriminatory reasons" for its personnel decisions, which reasons were accepted by the court as the actual reasons after Ms. Lawrence was unable to discredit them to the court's satisfaction. With respect to the initial denial of promotion by supervisor Orosz the court had to first guess that the possible reason most remote in time from the promotion decision was the agency's actual reason for rebuttal purposes, and then determine that that particular reason had not been sufficiently discredited. As with the treatment of the Norseth delay in promotion issue, the district court followed the *Mitchell* and *Cuddy* practice and rejected the rule laid out in *Uviedo* and *Rowe*.

On the post-transfer delay in promotion to GS 12, the court had to first ignore the reason contemporaneously given by Mr. Norseth (that a desk audit had to precede promotion) and Ms. Lawrence's discrediting of that reason (through Mr. Norseth's own admission at trial that it was not the reason); the court then had to assume that the supervisor took five months to determine any employee's abilities before promoting him or her, and that this, therefore, was the articulated reason for *McDonnell Douglas* purposes:

> Plaintiff argues that Norseth never articulated "evaluation" as the reason for the five month delay in promotion. PPFF at ¶ 15. This hyper-technical argument is adequately answered by the fact that the requirement that a supervisor determine an employee's abilities before recommending promotion is in evidence. Stip. No. 27. The five month evaluation period was reasonable . . . .

(Pet. App. 32a-33a).

B. The different procedures place the burden of production of a statement by defendant's witnesses as to the reason for the personnel action, and hence the risk of loss in the event of non-production, on different parties.

The difference in treatment of the defendant's evidentiary burden makes an enormous practical difference to litigants. Where, as in this case, the court had denied a defendant's Rule 41(b) motion claiming that the plaintiff had failed to make out her prima facie case, and then the defendant's witnesses fail to testify what their reasons were for the challenged personnel action, what the plaintiff needs to do to prevail is radically different depending on the circuit.

In the Fifth and Sixth Circuits, the plaintiff need do nothing. By failing to have its witnesses identify their reasons, the defendant has failed to meet its burden of production under *McDonnell Douglas*. As was made explicit in *Burdine*, this means the plaintiff is entitled to prevail:

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, 450 U.S. at 154.

In the District of Columbia Circuit, in contrast, the defendant is not deemed to be "silent in the face of the presumption" if any evidence of possible nondiscriminatory reasons is somewhere in the record. In this circuit, therefore, the plaintiff must either ask the employer's witnesses to identify the actual reason they

rely on[17] or attempt to discredit every single one of the possible reasons lurking in the record; if, as here and in *Mitchell* and *Cuddy*, the plaintiff fails to meet this extraordinary burden, the defendant prevails.

C. The District of Columbia Circuit practice—rather than the Fifth and Sixth Circuit practice—is erroneous.

Even were there not the inter-circuit conflict, this Court should grant certiorari because the District of Columbia Circuit has decided the rebuttal burden question in a way that conflicts with the decisions of this Court. Rule 17.1(c).

The evidence relied on in this case and such cases as *Mitchell* and *Cuddy* might well "raise[ ]a genuine issue of fact as to whether [the employer] discriminated against the plaintiff." *Burdine*, 450 U.S. at 254. This type of evidence fails, however, to serve the purpose of framing the factual issue:

> Placing this burden of production on the defendant thus serves simultaneously to meet the prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Burdine, 450 U.S. at 255-6.

The problem cannot be avoided by leaving issue-framing to the argument of counsel, for this Court has already held that the articulated reason—which must, among other things, serve to frame the issue—must consist of evidence admitted into evidence and may not be the argument of counsel:

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17. In effect, the burden of placing into the trial record evidence identifying the employer's reason would be placed on the employee.

> An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.

Burdine, 450 U.S. 255 n. 9.

If the articulation must consist of admissible evidence, and if the articulation must specify the reason relied on by the employer, the articulation must consist of evidence introduced by the employer specifying the reason it relied on.

The point is made equally clearly by considering the incredible litigation advantage the employer is given under the D.C. Circuit practice. In the present case, evidence suggesting three separate reasons for initially denying the promotion was placed in the record: that shortly before the promotion was due Ms. Lawrence demonstrated an inability to work with her colleagues; that shortly before the promotion was due Ms. Lawrence absolutely refused to perform any work; and that two years earlier, prior to her preceding promotion, Ms. Lawrence had disagreed with a certain contractor.

Ms. Lawrence attacked each of the possible reasons. Ironically, however, her attack on the two that were temporally and logically related to the promotion decision was so devastating that the court apparently concluded they were not meant by Mr. Orosz to be reasons (they are not, in any event, even mentioned by the court). That left the third possible reason. The court held that Ms. Lawrence had failed in her attempt to show that Mr. Orosz's testimony about the alleged 1975 problems was non-credible. The court concludes that this must have been the reason for the promotion denial.

In October, 1974, plaintiff began to work on the

> Maritime Administration Studies and Statistics (MATS) project. Her supervisor, Orosz, explained that during plaintiff's first four months on the project she worked very hard and was "very bright, very thorough, [and] showed a lot of potential." Tr. 6/27 at 7 (Orosz test.). She objected, however, when MarAd decided to delegate the project to a private contractor. Tr. 6/27 at 11 (Orosz test.). Her objections became obstructive. Tr. 6/27 at 11-12, 27, 32 (Orosz test.). The contractor complained about her persistent refusal to abide decisions of the contractor and her superiors. Tr. 6/27 at 14-15 (Orosz test.). After these impasses developed, her supervisor, Orosz, reassigned her away from the MATS project. Tr. 6/27 at 16 (Orosz test.).
>
> * * *
>
> Plaintiff's proffered proof as to pretext first attacks Orosz's credibility. [Citation omitted]. The Court, however, finds Orosz's testimony as to problems in the MATS program credible.

(Pet. App. 30a-32a).

Had Ms. Lawrence not so thoroughly discredited the two reasons more obviously related to the promotion denial, one or both of them presumably would have been relied on by the court, with the 1975 MATS problem reduced to mere background (as urged by the agency itself).[18]

---

18. "Appellee's articulated description of appellant's substantial performance problems dating from 1975 and 1976, culminating in her defiant refusal to work on the projects she

(Cont'd)

The Catch 22 covering Ms. Lawrence was as follows. If she failed to discredit the refusal-to-work charge and the difficulties-with-colleagues charge, these would be adopted by the court as the reasons for the denial of promotion; not having been shown to be unworthy of credence, they would bar judgment for Ms. Lawrence. But she successfully discredited the charges so thoroughly that the court presumed they could not have been meant as reasons for the personnel action, and the court turned to the more remote charge—one which had not been successfully discredited. In order to prevail Ms. Lawrence had to have left enough credibility to the refusal-to-work charge and the difficulties-with-colleagues charge as to create in the judge's mind the possibility that Mr. Orosz meant these to be the explanations for the promotion denials, but at the same time discredit the charges so thoroughly that the judge would conclude they were "unworthy of credence" as explanations for the promotion denial. This cannot be the proper interpretation of this Court's employment discrimination decisions.

The subsequent delay in promotion under Mr. Norseth presented a similar tactical dilemma. After Mr. Norseth had admitted that the reason he gave Ms. Lawrence at the time was not true, Ms. Lawrence could have demanded that he articulate his actual reason and then attempted to discredit that reason through further examination:[19]

(Cont'd)

> was directed to pursue after September 1976, amply supports Mr. Orosz's decision not to promote appellant. This finding also rebuts appellant's unlikely contention that Mr. Orosz precipitated appellant's problems with her colleagues."

(Resp. Br. in Court of Appeals at 13).

19. Indeed, had Mr. Norseth testified at trial that he had not determined Ms. Lawrence was capable of performing GS 12 work until five months after (Cont'd)

> [T]here may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Burdine, 450 U.S. at 255 n. 10.

Because she treated the articulation of the employer's reasons as a burden on the employer rather than the plaintiff, Ms. Lawrence lost her case. Had the case been tried in the Fifth or Sixth Circuit, with identical circumstances, Ms. Lawrence would have prevailed.

D. The recently re-emphasized obligation to defer to the fact findings of the district court does not weaken the doctrine that if the employer fails to properly rebut a prima facie case of discrimination judgment must be entered in favor of the plaintiff.

If the D.C. Circuit's *Mitchell v. Baldridge* and *Cuddy v. Carmen* doctrine is correct, then it was proper for the court of appeals to rely on *Anderson v. Bessemer City*, 470 U.S. 564 (1985)—which reminded appellate courts that fact findings can be set aside only if "clearly erroneous." If, however, the Fifth and Sixth Circuits are correct in holding that a prima facie case of discrimination is not rebutted if the putative nondiscriminatory reason must be inferred by the court rather than articulated by a witness, then a "clearly erroneous" analysis would be a mere formality:

(Cont'd)
she was placed under his supervision, he would have had to have explained the following statement he wrote in mid-1978:

> Ms. Lawrence brought an exceptionally high level of expertise to the job at the outset.

(Plaintiff's Exhibit 137 at 2).

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. *If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.*

Burdine, 450 U.S. at 154. (Emphasis added.)

If the trial court has entered judgment for the defendant when it had no choice but to enter judgment for the plaintiff, the findings of fact are necessarily "clearly erroneous."

This case presents an example of why this is so. If Mr. Orosz or Mr. Norseth had testified why the promotion had been denied or delayed, the presumption of discrimination created by the prima facie case would have been destroyed. After considering the agency's corroborating evidence and any evidence Ms. Lawrence had to discredit the articulated reason, the trial court would have been in the position of choosing between the two explanations for the conduct, and to have relied, at least in part, on the credibility of the management witnesses. The district court could have said, "Mr. Orosz swears he denied the promotion in 1977 because of work problems Ms. Lawrence had in 1975. Although there is some evidence to the contrary, I believe him." That holding would have been of the type which "can vitually never be clear error." *Anderson*, 470 U.S. at 575.

In fact Mr. Orosz did not state why he denied the 1977 promotion, so the district court's decision does not depend on the credit to be given a witness' testimony on the reason for the promotion denial. Thus, when the court of appeals says "the District Court found more credible appellee's explanation of the disputed events and their causes," (Pet. App. 6a), it must be

referring to the argument of counsel—the only vehicle the appellee used for providing an "explanation of the disputed events and their causes."

II.

DAMAGES AND ATTORNEY FEES UNDER THE PRIVACY ACT SHOULD NOT BE DENIED SIMPLY BECAUSE THE PLAINTIFF SUBSEQUENTLY RESPONDED TO THE INACCURATE DOCUMENTS.

The district court's denial of damages and attorney fees for the Privacy Act violation is based on a non-sequitur.

It is true that once Ms. Lawrence discovered that the secret documents existed and had been used to justify a determination adverse to her, 5 U.S.C. § 552a(g)(1)(C), she filed a complaint which, among other things, responded to the accusations against her. It is impossible to understand the district court's concluding from this that the agency's failure to maintain its records "with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness . . . and consequently a determination is made which is adverse to the individual," 5 U.S.C. § 552a(g)(1)(C), was nonwillful or unintentional.[20]

The court of appeals' approval of the district court's reasoning presents an important question of federal law which should be settled by this Court. Rule 17.1(c).

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20. Even if the district court's opinion were understood as finding the injury from the violation to have been totally mitigated by subsequent action, thus barring recovery of actual damages, this would provide no explanation for the denial of the recovery of attorney fees.

III.

A DISTRICT COURT CANNOT BE SAID TO HAVE MADE ADEQUATE FINDINGS WHERE THE COURT OF APPEALS MUST READ THE OPINION AS COVERING A SUBJECT CLEARLY EXCLUDED FROM IT.

The court of appeals' approval of the district court's treatment of Ms. Lawrence's 1979-82 Equal Pay Act claim calls for an exercise of this Court's power of supervision. Rule 17.1(a).

The district court's opinion on its face says it is dealing only with the 1974-76 claim but nevertheless twice refers to arguments presented not on that claim but on the 1979-82 claim. This confusion in the reasoning suggests the opinion was defective as to the earlier claim; the confusion cannot justify a conclusion that the opinion adequately explained the court's denial of the later claim. If nothing else, the district court failed to "find the facts *specially* and state *separately* its conclusions of law thereon," Fed. R. Civ. Proc. 52(a) (emphasis added), since according to the court of appeals every fact-finding covered two disparate sets of years, as did every conclusion of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

PHILLIP R. KETE
Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5007

Janis M. Lawrence,

Appellant,

v.

Elizabeth Dole,
Secretary of Transportation, Et Al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: Wald, Chief Judge, Mikva, Circuit Judge, and Gesell, District Judge.*

JUDGEMENT

This cause was received on the record on an appeal from an order of the United States District Court for the

*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 294(d).

District of Columbia and was briefed by and argued by counsel for the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See D.C. Cir. R. 13(c). On consideration thereof and for the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED, by this Court, that the appeal is hereby dismissed. It is

FURTHER ORDERED, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981, and June 15, 1982. This instruction to the Clerk is without prejudice to right of any party at any

time to move for expedited issuance of the mandate for good cause shown.

Per Curiam

For the Court

George A. Fisher
Clerk

Janis M. Lawrence v. Elizabeth Dole,
No. 86-5007

MEMORANDUM

Janis Lawrence appeals the judgment of the District Court dismissing her claims under Title VII of the Civil Rights Act and the Equal Pay Act, and denying damages and costs as a remedy for the appellee's violation of the Privacy Act. For purposes of discussion, we will group the claims according to the statute under which they arise.

Appellant's Title VII Claims

Appellant argues that appellee, her employer, by various acts and omissions committed unlawful sex discrimination against her. Specifically, appellant claims that appellee discriminated against her by: (a) delaying her promotions to levels GS-12 and GS-13; (b) by

failing to promote her to GS-14; (c) by failing to investigate physical altercations between appellant and a fellow female employer; (d) by denying two of appellant's requests to participate in training courses; and (e) by retaliating against her because of her participation in a Title VII class action.

In order to prevail in an individual disparate treatment claim, a plaintiff must prove by a preponderance of the evidence that the defendant's conduct was motivated by discriminatory animus. See, e.g., Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Although the District Court acknowledged that appellant suffered adverse consequences in her employment because "something [went] wrong in the

relationship between plaintiff and her work environment," Memorandum Opinion at 3 (October 30, 1985), the District Court concluded that appellant had failed to prove that, more likely than not, the treatment that appellant suffered occurred because she was a woman.

We have no basis for ruling that the District Court's determination was clearly erroneous. In this case, a resolution of the Title VII issues turn on an assessment of the credibility of conflicting testimony. See i.d. Basically, the District Court found more credible appellee's explanation of the disputed events and their causes. It found that appellant suffered various adverse consequences at her job because of her inability to work with her

colleagues--not because of her sex. The Supreme Court has recently addressed our duty as an appellant court in situations like this one: "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent can virtually never be clear error." Anderson v. City of Bessemer City, 105 S. Ct. 1504, 1513 (1985). The present case is certainly not one of those few in which there is extrinsic evidence that renders the District Court's credibility determination clearly erroneous.

Appellant's Equal Pay Act Claims

Appellant contends that for certain periods of her employment she was doing equivalent work to that of other employees classified as GS-14 and GS-15, who because of their higher classification were receiving higher pay. On appeal, she argues that the District Court, in dismissing her Equal Pay Act claim regarding GS-15 work, failed to submit findings-of-fact and conclusions-of- law as required by Federal Rules of Civil Procedure 41(b), 52(a). Although certain statements in the District Court's memorandum opinion raise some ambiguities, we find that when read in totality, the opinion contains the requisite findings and conclusions.

The District Court's memorandum opinion contains a section entitled "Equal Pay Act." At first glance this section might be read as applying only to appellant's claim regarding GS-14 work, since it begins: "In addition to the Title VII claims, plaintiff seeks relief under the Equal Pay Act. Specifically, she seeks back pay at the GS-14 level for the two years she worked on the MATS project," Memorandum Opinion at 16 (emphasis added), and ends: [P]laintiff also seeks reconsideration of the Court's prior ruling dismissing her GS-15 Equal Pay Act claim. This issue was properly decided and the accompanying order will deny plaintiff's motion for reconsideration. Id. at 19 (citation omitted) (emphasis added).

The "accompanying order," to which the District Court referred and which was filed with the memorandum opinion, only "ORDERED: that plaintiff's Motion for Reconsideration of Ruling Dismissing Plantiff's GS-15 Equal Pay Act Claim is hereby DENIED." The "prior ruling" to which the District Court referred was an oral decision from the bench during trial. At the time, the District Court merely stated: "I'm going to grant the motion of the government on that issue. That will be reflected in a written order." Transcript at 147. The "written order" mentioned must have been the Order of October 30 and the accompanying memorandum opinion, since the parties do not refer us to, nor can we locate, any

other relevant order or ruling in the record.

The quoted language from the memorandum opinion, standing alone, might suggest that its discussion applies to only the GS-14 Equal Pay Act claim and that the District Court therefore failed to submit the requisite findings and conclusion for the GS-15 claim. There is, however, other language in the Equal Pay Act section that makes evident that the District Court's findings and conclusions contained in that section encompass the GS-15 as well as the GS-14 claim. For example, "proceed[ing] to the merits of plaintiff's Equal Pay Act claim," the District Court stated: "Plaintiff argues [that] 'she was performing work requiring equal skills, efforts, and responsibili-

ties as GS-14's and GS-15's.'" Id. at 17 (quoting Plaintiff's Proposed Findings of Fact at 63) (emphasis added). The District Court then goes on to cite plaintiff's "Memorandum of Points and Authorities in Support of Motion for Reconsideration of Ruling Dismissing Plaintiff's GS-15 Equal Pay Act Claim," id. (emphasis added), in saying that "[p]laintiff offers evidence as to allegedly 'representative' projects but she does not offer specific evidence which compares her entire job with the entire job of a higher paid male employee." Id. (emphasis in original). And again, the District Court cites "Plaintiff's Reply to Opposition to Motion For Reconsideration of Dismissal of GS-15 Equal Pay Act Claim" to reject

plaintiff's for additional discovery on the issue. Id. (emphasis added). Given these explicit references to plaintiff's GS-15 claim in the District Court's discussion of the Equal Pay Act, we conclude that the findings-of-fact and conclusions-of-law which are contained in that discussion apply to both the GS-14 and the GS-15 claims.

These findings are, moreover, adequate for the purposes of this appeal. Cf. Lyles v. United States, 759 F.2d 941 (D.C. Cir. 1985) (per curiam) (holding findings pursuant to a Rule 41(b) dismissal to be insufficient); Defenders of Wildlife, Inc. v. Endangered Species Scientific Authority, 659 F.2d 168 (D.C. Cir. 1981) (same). The District Court's ruling depends on an

application of a legal principle which the court derives from Corning Glass Works v. Brennan, 417 U.S. 188, 195-96 (1974): to prevail on her Equal Pay Act claim, appellant must show "substantia equality" of her entire job and the entire jobs of male coworkers. The correctness of this legal proposition is not at issue in this appeal. (Indeed, appellant did not appeal the adverse determination with respect to GS-14 work, and the only grounds on which she appealed the dismissal of the GS-15 claim was the failure to submit requisite findings and conclusions.) The District Court ruled against appellant because he found, as a fact, that she had not shown substantial equality of her entire job of those of male GS-14's or GS-15's. This

finding is sufficient for the District Court's ultimate decision and it is not clearly erroneous.

The Appellant's Privacy Act Claim

The District Court denied plaintiff damages for appellee's violation of the Privacy Act because it found that the violation was not intentional. Nor was this finding clearly erroneous in light of the evidence in the record.

For the foregoing reasons, this appeal is dismissed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANIS LAWRENCE,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil Action
	)	83-2876
ELIZABETH DOLE,	)	
	)	
Defendant.	)	

MEMORANDUM

I

This case is an outgrowth of a class action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982), against the Maritime Administration ("MarAd") by minority employees there. Harrison v. Lewis, 559 F. Supp. 943 (D.D.C. 1983), affd. except for determination of the relevant time period in defining the class entitled to relief, No. 83-1678 (March 1,

1984) (unpublished). The class action resulted in rulings that whereas black female employees at MarAd were victims of systemic sex and race discrimination, the discrimination claims of white female employees could not be sustained. Indeed, the evidence demonstrated that white female employees:

> have, if anything, been selected in disproportionately greater numbers in competitive appointments at MarAd. Though some of this overselection of women disappears if the apparent bias in favor of applicants from within MarAd is factored in, there remains a slight, statistically insignificant preference for women.

Harrison, slip op. at 33 (footnote omitted) emphasis in original).

One white female employee, Janis Lawrence, nevertheless persisted in her sex discrimination claim and pursued her

claim independently. According to the Court in the class action:

> Since the earlier trial focused only on the class claims of disparate impact, . . . there is no inconsistency between the court's finding of no disparate impact classwide and the right of Janice Lawrence, as an individual claimant, to present her claim of disparate treatment. In presenting this claim, of course, the individual plaintiff must meet the evidentiary burdens set out in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 . . . (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 . . . (1973).

559 F. Supp. at 947.

Plaintiff cites numerous individual events, all of which she claims were a result of illegal sex discrimination and/or retaliation for her particpation in the class action on the part of her employer, MarAd. Plaintiff's allegations

are as follows: (1) she became eligible for a career ladder promotion from GS-11 to GS-12 in March, 1977, but was not promoted to GS-12 until January 1978; (2) she suffered a delay of one year in promotion from GS-12 to GS-13; (3) she was not promoted from GS-13 to GS-14 and was reassigned to a non-economist position thereby further diminishing her opportunity for promotion to GS-14; (4) she was twice assaulted and battered by a female co-worker; and she was improperly disciplined because of these batteries; (5) her employer kept secret files relating to the alleged assaults and batteries in violation of the Privacy act of 1974, 5 U.S.C. § 552a (1982); (6) the agency improperly denied plaintiff's request that it fund two graduate economics

courses she wanted to take and (7) the agency violated the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982) by paying her lower than GS-14 level wages during her early tenure at the agency (October, 1976-October, 1978).

At a plenary trial, the parties introduced numerous exhibits and adduced substantial testimony. Important in evaluating the evidence and testimony adduced at the trial was the demeanor and credibility of the witnesses offered since the key actors in this drama, plaintiff Lawrence and her superiors, differed sharply in their recollection and interpretation of events. Although plaintiff presented her case as a series of discrete events, what emerged was a general overview of plaintiff's employ-

ment situation over a number of years and from the points of view of a number of different co-workers. It is a painful account of a talented person who had a series of difficulties in relating to her supervisors and fellow employees. The trial was a series of mini trials in which the parties presented the two sides of plaintiff's differences with her supervisors about the value of her work and attempted to demonstrate who was responsible for various shouting matches, and even physical altercations, some with a male supervisor, some with a female subordinate of plaintiff. It is not necessary for the Court to resolve the right and wrong of the plaintiff or her colleagues in each or any of these controversies. It is obvious that something

was wrong in the relationship between plaintiff and her work environment. The question is, however, whether that something was actionable sex discrimination.

Burdine, supra, sets out the following burdens of proof in a Title VII case:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection'... Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

450 U.S. at 252-53 (citations omitted).

McDonnell Douglas Corp. v. Green, supra, articulates the elements of plaintiff's prima facie case. Plaintiff must show: (1) she is a member of a protected class; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) despite her qualifications, she was rejected; and (4) after her rejection, the position remained open and the employer continued to seek applicants with plaintiff's qualifications. 411 U.S. at 802. Courts have modified the fourth McDonnell Douglas factor to apply to an employer's failure to promote. In addition to the first three factors listed in McDonnell Douglas, a plaintiff claiming failure to promote must show that "other employees of similar qualifications who were not

members of the protected group were indeed promoted at the time the plaintiff's request for promotion was denied." Bundy v. Jackson, 641 F.2d 934, 951 (D.C. Cir. 1981).

This order and allocation of proof for a general disparate treatment case has also been adapted and applied to retaliation cases. B. Schlei & P. Grossman, Employment Discrimination Law 557 (2d ed. 1983). In a retaliation case, plaintiff must show: (1) she was engaged in a statutorily protected activity; (2) the employer took an adverse personnel action; and (3) a causal connection existed between the two. McKenna v. Weinberger, 729 F.2d 783, 790 (D.C. Cir. 1984).

According to the Supreme Court in Burdine, supra, "The burden of establishing a prima facie case is not onerous." 450 U.S. at 253. And in a reprisal case, "[a]s in a case of disparate treatment, the initial burden is not great." McKenna, supra, 799 F.2d at 790. Therefore, as to the individual acts and the general scheme of acts alleged in this case, plaintiff has presumptively established a prima facie case.

Plaintiff's prima facie case, however, only raises the inference of discrimination or retaliation. Here, the evidence firmly supports a finding that defendant articulated legitimate and nondiscriminatory explanations for the differences between the plaintiff's

expectations, and the promotions, training and assignments accorded to her by defendant. Legitimate, nondiscriminatory reasons for an employment action include comparative lack of qualifications, Valentino v. United States Postal Service, 674 F.2d 56, 64 (D.C. Cir. 1982); attitudinal problems and inability to work with fellow employees, Burrus v. United Telephone Company of Kansas, 683 F.2d 339, 344 (10th Cir.), cert. denied, 459 U.S. 1071 (1982); personality and authority conflicts with a supervisor, McCarthy v. Cortland County Community Action Program, Inc., 487 F. Supp. 333, 343 (N.D.N.Y. 1980); fighting with a fellow employee, Green v. Armstrong Rubber Co., 612 F.2d 967, 968 (5th Cir.)

(per curiam), cert. denied, 449 U.S. 879 (1980); and budgetary constraints, Orahood v. Board of Trustees of University of Arkansas, 645 F.2d 651, 656-57 (8th Cir. 1981). All of these considerations appear to have played a part in one or more of the employment decisions at issue in this case.

Once defendant has articulated a legitimate, nondiscriminator reason for the employment action at issue, plaintiff bears the ultimate burden of proving by a preponderance of the evidence that illegal considerations actually motivated defendant. Burdine, supra, 450 U.S. at 253. In a disparate treatment case, "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact

of differences in treatment." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); see Valentino, supra, 674 F.2d at 60 n.1 ("[d]iscriminatory motive is ultimately an essential element.") Here, the evidence simply does not support a finding that any of the employment actions alleged by plaintiff were taken because of plaintiff's sex or because she had participated in the earlier class action. In fact, the separate charges of non-promotion, physical harassment (batteries), and improper punishment, viewed individually or in perspective, all tend to corroborate the ultimate finding that plaintiff's failure to adjust to her work environment, rather than reprisal or sex discrimination,

accounts for the discrepancies between her expectations and her rewards.

II

Although all of plaintiff's individual allegations appear in fact to make up a unified whole, plaintiff has separated them for purposes of argument and briefing. A discussion of each individual claim follows.

(1) Promotion from GS-11 to GS-12

Plaintiff claims that she was not promoted from GS-11 to GS-12 as quickly as she was entitled because of illegal sex discrimination on the part of her first supervisor, Stephen C. Orosz, and retaliatory animus on the part of her second, Howard G. Norseth. Plaintiff was hired by MarAd as a GS-7 economist in August, 1974. Stipulations of Fact

(Stip.) No. 6. She was assigned to the Division of Trade Studies and Statistics. Stip. No. 8. In October, 1974, plaintiff began work on the Maritime Administration Studies and Statistics (MATS) project. Her supervisor, Orosz, explained that during plaintiff's first four months on the project she worked very hard and was "very bright, very thorough, [and] showed a lot of potential." Tr. 6/27 at 7 (Orosz test.). She objected, however, when MarAd decided to delegate the project to a private contractor. Tr. 6/27 at 11 (Orosz test.). Her objections became obstructive. Tr. 6/27 at 11-12, 27, 32 (Orosz test.). The contractor complained about her persistent refusal to abide decisions of the contractor and her superiors. Tr. 6/27 at 14-15 (Orosz

test.). After these impasses developed, her supervisor, Orosz, reassigned her away from the MATS project. Tr. 6/27 at 16 (Orosz test.). Her experience during reassignment was characterized by a warning, Defendant's Exhibit (DX) 167; a grievance, Plaintiff's Exhibit (PX) 123(a); a settlement whereby the warning was expunged from plaintiff's personnel file, and plaintiff received a retroactive within grade increase and agreed to reassignment to another division and another division chief. PX-154.

The reassignment was designed to enable a supervisor who had not been involved in the controversy with plaintiff to evaluate her. See Tr. 6/28 at 14 (defense counsel). As a requirement for promotion to the GS-12

level, her supervisor had to determine that she had demonstrated ability to perform at that level and to so inform the Office of Personnel. Stip. No. 27. After five months, her new supervisor, Norseth, recommended that she be promoted to GS-12. Stip. No. 53.

Plaintiff's proffered proof as to pretext first attacks Orosz's credibility. Plaintiff's Amended Proposed Findings of Fact and Conclusions of Law (PPFF) at ¶¶ 6, 12 (filed Aug. 5, 1985). The Court, however, finds Orosz's testimony as to problems in the MATS program credible. Second, plaintiff argues that the five month delay of her promotion after her transfer to the new division was unreasonable and retaliatory. PPFF at ¶ 14B. Plaintiff argues that

Norseth never articulated "evaluation" as the reason for the five month delay in promotion. PPFF at ¶ 15. This hyper-technical argument is adequately answered by the fact that the requirement that a supervisor determine an employee's abilities before recommending promotion is in evidence. Stip. No. 27. The five month evaluation period was reasonable, and the fact of the warning, grievance, settlement and transfer adequately justify any overall delay in plaintiff's promotion. Plaintiff has failed to demonstrate by a preponderance of the evidence that defendant's articulated reason for any delay in promotion from GS-11 to GS-12 is pretextual.

(2) Promotion from GS-12 to GS-13

Plaintiff complaints about the lapse of 23 months between her promotion to GS-12 and her promotion to GS-13. The type of promotion she sought was non-competitive and resulted from reclassification at a higher grade because of accretion of responsibilities and duties. Stip. Nos. 35, 56. Plaintiff did not become eligible for the promotion to GS-13 until January, 1979, when she had completed one year at GS-12. Defendant's Response to Plaintiff's Amended Proposed Findings of Fact and Conclusions of Law (DPFF) at ¶ 23 (filed Aug. 16, 1985) (citing 5 C.F.R. § 300.601). On the average GS-12's at MarAd were in grade 32 months before receiving promotion, either competitive or noncompetitive. DX-168. In fact,

plaintiff's male colleague, Byington, sought promotion at the same time as plaintiff. By the time he was promoted to GS-13, in January, 1980, he had spent 3-1/2 years as a GS-12 economist. Stip. Nos. 65-66.

When plaintiff and Byington first sought promotion, there was no vacancy. Tr. 6/26 at 128 (Norseth test.). Indeed, the division where she worked was contracting and was finally abolished in 1982. Tr. 6/26 at 77 (Turanin test.). Nevertheless, plaintiff's supervisor, prepared a quality step increase for her, Tr. 6/26 at 142 (Norseth test.), and in late 1979, recommended her for promotion to GS-13. Tr. 6/26 at 145-48 (Norseth test.). Norseth's motives for the recommendation were to reverse the

decline of the division and to allay the perceived dissatisfaction of plaintiff as evidenced by a memorandum she wrote to Norseth in September, 1978 (before she was eligible for promotion to GS-13), alleging, among other things, that he failed to recognize her "expertise and accomplishment." PX-127. According to Norseth, the justification for his recommendation of promotion was "very weak." Tr. 6/26 at 145.

Instead of demonstrating discriminatory or retaliatory animus, the evidence and testimony at trial showed a supervisor making promises which were difficult to keep, Tr. 6/26 at 92 (Thomas test.), in order to placate a difficult subordinate. Tr. 6/26 at 142 (Norseth test.). Plaintiff discredits Norseth's

testimony, PPFF at ¶¶ 19, 20, but the Court finds it convincing and credible, even if a somewhat disturbing example of management technique. Thus, as to her claim that she was wrongfully denied promotion to GS-13, plaintiff has also failed to prove that defendant's articulated justification for the employment action is a pretext for illegal sex discrimination or retaliatory motive.

(3) Non-promotion to GS-14; Reassignment to non-economist position

Plaintiff sought promotion from GS-13 to GS-14 by accretion. But her supervisors were not persuaded that her work justified a GS-14, as distinguished from a GS-13 position. Tr. 6/26 at 126, 140 (Norseth test.); Tr. 6/26 at 98, 107 (Thomas test.). A senior classifier from

the Office of Personnel conducted a routine desk audit and reached the same conclusion. Tr. 6/25 at 183-85 (Crews test.); PX-297.

Charges have flown back and forth during the pre-trial and trial about the fairness or unfairness of the classification decision. For example, plaintiff had worked intensively on a domestic shipping study shortly before the year which was the subject of the desk audit. PX-128. The parties dispute the quality and importance of the paper, compare PPFF at ¶ 33 with DPFF at 33; whether plaintiff was solely responsible for it or shared responsibility with others, compare PPFF at ¶ 33 with DPFF at 34; PX-342; Tr. 6/26 at 96, 103, 112 (Thomas test.); Tr. 6/26 at 133 (Norseth

test.); Tr. 6/25 at 5-7 (Lawrence test.); Tr. 6/26 at 102 (Crews test.); and the weight to which it was entitled in light of the fact that it was completed outside the period formally addressed by the desk audit. PPFF at ¶ 33; DPFF at ¶ 33. Plaintiff further attacks the classification decision by alleging that a number of her other projects were "normally or presumptively performed at the GS-14 or GS-15 level." PPFF at ¶ 34. But, an individual with senior level experience in classification evaluation who did not previously know plaintiff talked with plaintiff and her supervisors, Tr. 6/25 at 179-84 (Crews test.), evaluated her position in terms of five factors and found it to justify a GS-13 classification. PX-297.

Perhaps the merits of plaintiff's classification may be a problem cognizable by the Merit Systems Protection Board ("MSPB"). But the issue presented to this court is whether the classification was the result of illegal sex discrimination or reprisal. Plaintiff argues that her supervisors tainted the classifier's investigation. PPFF at ¶ 33. Yet the classifier indicated that his focus was on assignments given, not performance, Tr. 6/25 at 188 (Crews test.), and that he gave plaintiff's statements as to the nature of her assignments substantial weight. Tr. 6/25 at 190-91 (Crews test.). Moreover, there is evidence on the record which demonstrates that other individuals also had responsibility for

the projects plaintiff claims qualified her for the higher GS levels. Tr. 6/25 at 5-7 (Lawrence test.); Tr. 6/26 at 102 (Thomas test.) (domestic shipping paper); Tr. 6/25 at 27 (Lawrence test.), PX-337 (coal study); Tr. 6/25 at 20 (Lawrence test.), PX-259 (subsidy initiative). Plaintiff has not met her burden of showing that the presumptively regular classification decision was motivated by discriminatory or retaliatory animus.

Plaintiff also alleges that after her particular division was abolished in July, 1982, she was reassigned to a position with "no economist functions" thereby interfering with "her professional growth in the field of economics." PPFF at ¶ 35. Plaintiff argues she should have been reassigned to the

division of marine plans. PPFF at ¶¶ 38, 39. But again, there is no evidence that her reassignment to her less preferred position was a result of sexual or retaliatory bias on the part of management. Her superiors felt that the position she received contained bona fide economist functions. Tr. 6/25 at 198-201 (Crews test.); Tr. 6/26 at 79, 85-87 (Turanin test.); PX-296. Moreover, her male colleagues, Russell Byington, is still a GS-13 economist. Stip. No. 77. Finally, other employees of her abolished division were actually downgraded in the course of reassignment. Tr. 6/26 at 78 (Turanin test.); Stip. No. 77. In the face of these facts, plaintiff's treatment does not seem unusual or discriminatory.

(4) Batteries; Improper Punishment

Plaintiff also asserts a reprisal claim on account of defendant's alleged failure to discipline Idalene Price, a black female employee who was involved in two altercations with plaintiff, and on account of the alleged wrongful discipline of plaintiff in connection with these events. It is undisputed that there were two physical altercations. PPFF at ¶ 45(a); DPFF at ¶¶ 46, 50. There is dispute, however, over who was the aggressor in these incidents. Compare Tr. 6/25 at 151 (Price test.); PX-242; PX-244; PX-245; PX-246 with PX-360; Tr. 6/25 at 47-48 (Lawrence test.).• It must be noted that in the second incident it is undisputed that plaintiff asked Price, as Price came into the

ladies room to dispose of her breakfast trash, "Do you have to bring your smelly food in here, too?" Tr. 6/25 at 37 (Lawrence test.). Who hit whom after this remark is then in dispute.

Without definitively resolving the right and wrong of these intraoffice fights, it is clear that plaintiff has failed to establish any causal connection between the altercations and reprisal against her for involvement in the class action suit. Management's decision to discipline plaintiff instead of Price, whether or not correct and whether or not made pursuant to proper office grievance procedure, is certainly "explainable on nondiscriminatory grounds." See PPFF at ¶ 62. Even if the altercations had had no witnesses, management could reasonably

have chosen one participant's version over the other's. But here, numerous fellow employees, subordinates and superiors, female and male, black and white, indicated that they thought plaintiff was to blame. PX-242; PX-244; PX-245; PX-246; PX-239. There is no evidence to tie each of these fellow employee's points of view to discriminatory or retaliatory animus. Absent such a causal nexus, management's determination to discipline plaintiff and not Price must survive scrutiny under Title VII.

(5) Privacy Act

Very late in this action, in closing argument, Tr. 6/28 at 92-98 (defense counsel), plaintiff has raised a claim

under the Privacy Act. This statute requires that a federal agency:

> maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.

5 U.S.C. § 552a (e)(5). After the first altercation between plaintiff and Price, the EEO officer of the agency asked several employees to record their recollection of the altercation and any other recollections relevant to the harassment complaint of Price. Tr. 6/26 at 44-46 (Hawkins test.). He stored these notes in his desk drawer. Tr. 6/26 at 46 (Hawkins test.). In April, 1982, after the second altercation between plaintiff and Price, Price filed an EEO

grievance alleging that plaintiff had harassed her over a period of time. Stip. No. 92. An investigation ensued, and the EEO officer made available the memorandum he had stored in his desk drawer. Tr. 6/26 at 51 (Hawkins test.). The outcome of the investigation was a letter of admonishment to plaintiff. Stip. No. 93. Plaintiff claims that the agency improperly relied on this "secret file" in reaching its decision to reprimand her. PPFF at ¶ 57 (citing PX-239 p. 2 ¶ 8). As this Privacy Act claim was raised so late in the proceedings, the accompanying order will schedule supplementary briefing by the parties on this issue.

Plaintiff also attempts to use the alleged Privacy Act violation to buttress

her Title VII claim. She argues that if the keeping of the papers was a violation of the Privacy Act, then management has failed to articulate a legitimate, nondiscriminatory reason for the employment action in question. Tr. 6/28 at 93 (defense counsel). But plaintiff fails to perceive that proof of discriminatory motive is an essential element of Title VII action. Valentino, supra, 674 F.2d at 60 n.1. The statute itself prohibits discrimination only on the basis of certain protected characteristics. Plaintiff's argument that she can prove her Title VII case by showing an employment action improper for reasons not related to the protected characteristics articulated in the statute is simply wrong.

(6) Training

Plaintiff complains about a denial of her request to attend two graduate economic courses at MarAd expense. Tr. 6/25 at 53 (Lawrence test.). Defendants points to a restricted training budget, PX-225; Tr. 6/26 at 80, 81 (Turanin test.); Tr. 6/26 at 99-100 (Thomas test.); DX-164, and to the several training opportunities which were previously and subsequently afforded to her. Tr. 6/25 at 111-12 (Lawrence test.). These facts adequately account for MarAd's refusal to afford plaintiff the additional special training opportunities which she sought. Plaintiff's argument that three male co-employees had training approved, PPFF at ¶ 65, does not demonstrate that the

agency's reason for refusing a particular request of plaintiff's was pretextual. Like her male colleagues, plaintiff was afforded educational opportunities at MarAd's expense. Consequently, no inference of discrimination for this particular denial is warranted.

(7) Equal Pay Act

In addition to the Title VII claims, plaintiff seeks relief under the Equal Pay Act. Specifically, she seeks back pay at the GS-14 level for the two years she worked on the MATS project (October 1974-October 1976). First, the maximum limitations period for this claim is three years. 29 U.S.C. § 255(a). Neither plaintiff's administrative complaint, nor the complaint in the class action, alleged a violation of the Equal

Pay Act. Plaintiff's first complaint to invoke The Equal Pay Act was filed on September 29, 1983 -- seven years after the alleged violation. Plaintiff argues that "[t]he agency expressly waived any statute of limitations defense [sic] it might have had." PPFF at p. 63. In support of this argument, she attaches a cryptic excerpt from the pretrial conference held in this case on June 14, 1985. Notice of Filing (filed Oct. 21, 1985). But defendant specifically denies the waiver of this defense, DPFF at p. 1, and both the Answer (filed Dec. 3, 1983) and the Revised Pretrial Brief (filed Feb. 6, 1985) and the Revised Pretrial Brief (filed Feb. 6, 1985) raise this defense. Plaintiff's Equal Pay Act cause of action should thus be time-barred.

Even were the Court to proceed to the merits of plaintiff's Equal Pay Act claim, it could not find for plaintiff. Plaintiff argues relief is justified because at the time at issue "she was performing work requiring equal skills, efforts, and responsibility as male GS 14's and 15's." PPFF at p. 63. Yet "substantial equality" of the entire job is required under the Equal Pay Act. Corning Glass Works v. Brennan, 417 U.S. 188, 195-96 (1974). Plaintiff offers evidence as to allegedly "representative" projects, see Memorandum of Points and Authorities in Support of Motion for Reconsideration of Ruling Dismissing Plaintiff's GS 15 Equal Pay Act Claim at 3 (filed Aug. 1, 1985), but she does not offer specific evidence which compares

her entire job with the entire job of a higher paid male employee. This is especially true as to the "responsibility" requirement of the Act. Nowhere does plaintiff compare the degree to which she was supervised with that of the male employees she uses for comparison. Plaintiff complains that she had inadequate discovery as to this issue, Plaintiff's Reply to Opposition to Motion For Reconsideration of Dismissal of GS 15 Equal Pay Act Claim at 2 (filed Aug. 26, 1985), but neither was there testimony at trial comparing the responsibility of her job with that of allegedly comparably situated males. Absent more comprehensive evidence, plaintiff's claim must fail.

Even were plaintiff to have established some discrepancy in pay, one of the four affirmative defenses to an Equal Pay action is that different wages are paid "pursuant to . . . a merit system." 29 U.S.C. § 206(d)(1). The federal classification system is such a merit system. 5 U.S.C. § 5101, et seq.; Coles v. Martin, 23 F.E.P. 1804, 1808 n.14 (D.D.C. 1978). The fact that plaintiff "worked as a peer", PPFF at p. 63, with employees of higher GS levels does not establish that her position was improperly classified. Evidence on the record establishes that the method of job classification under the government system involves a five factor analysis by a trained classifier. DPFF at § 33.

Plaintiff points out that to be "bona fide", a classification system must be "applied in a sex-blind manner." Plaintiff's Revised Pretrial brief at § 20 (filed Jan. 7, 1985); Cayce v. Adams, 439 F. Supp. 606, 608 (D.D.C. 1977). But the decision in the class action forecloses the possibility that the entire classification system is sex-biased. Harrison, supra, 559 F. Supp. at 33. Plaintiff must thus prove that the legitimate classification system was sex-biased as applied to her. There is no evidence here that her supervisor "knew that her work was equal" to that of higher paid male employees and "[n]onetheless . . . knowingly permitted" the discrepancy. Id. at 608-09. In fact, her supervisor was unhappy with her

performance. Stip Nos. 12-15. As noted supra, at (1), the supervisor's unhappiness was not sexually motivated.

For all the reasons listed above, plaintiff's Equal Pay Act action must fail. Plaintiff also seeks reconsideration of the Court's prior ruling dismissing her GS-15 Equal Pay Act claim. Tr. 6/25 at 147 (defendant's oral motion granted). This issue was properly decided and the accompanying order will deny plaintiff's motion for reconsideration.

* * * * *

For all the above reasons and upon consideration of the voluminous evidence in this extended record, the accompanying order will direct entry of judgment for defendant except for the Privacy Act

claim and will dismiss plaintiff's complaint as to all Title VII and Equal Pay Act claims with prejudice.

Date: _____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANIS LAWRENCE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 83-2876
ELIZABETH DOLE,	)	
	)	
Defendant.	)	
	)	

ORDER

For reasons stated in the accompanying Memorandum, it is this ___ day of October, 1985, hereby

DIRECTED: that judgment be entered for defendant on all claims under Title VII and the Equal Pay Act; and it is further

ORDERED: that all counts in plaintiff's complaint under Title VII and

the Equal Pay Act are hereby DISMISSED with prejudice; and it is further

ORDERED: that plaintiff's Motion for Reconsideration of Ruling Dismissing Plaintiff's GS 15 Equal Pay Act Claim is hereby DENIED; and it is further

ORDERED: that defendant may file and serve by hand on or before November 8, 1985, supplemental findings of fact and conclusions of law addressing plaintiff's Privacy Act claim; and it is further

ORDERED: that plaintiff may respond to defendant's supplemental findings on or before November 15, 1985.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANIS LAWRENCE, Plaintiff,	)	
v.	)	Civil Action No. 83-2876
ELIZABETH DOLE, Defendant.	)	

MEMORANDUM

By Order of October 30, 1985, this Court dismissed with prejudice all counts in plaintiff's complaint under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). The Order directed, however, that the parties should file supplemental findings of fact and conclusions of law addressing plaintiff's claim under the Privacy Act of 1974, 5 U.S.C. § 552a. These

supplemental briefs have been filed, thus the case is ripe for final disposition.

I.

Defendant first alleges that plaintiff's Privacy Act claim is untimely, arguing that all civil actions to enforce the Act must be brought within two years from the date on which the cause of action arises. 5 U.S.C. § 552a(g)(5). Plaintiff's claim must be deemed to have arisen in October, 1982, after she had exhausted her internal agency remedies. Defendant accurately states that plaintiff never alleged a Privacy Act violation in those words until closing argument at trial on June 28, 1985. However, she filed her complaint in this court on September 29, 1983. Thereafter, she referred in her

deposition, pretrial briefs, and at trial, to "secret files" maintained by the agency and used in an adverse employment action against her. Her primary argument was that these "secret files" represented one act of unlawful reprisal under Title VII.

Plaintiff has now filed a Motion to Amend Complaint (filed Nov. 21, 1985), asking the Court to permit amendment of the complaint under Fed. R. Civ. P. 15(b) to conform to the evidence adduced at trial. The copious citations to the record in both defendant's and plaintiff's supplemental filings make it clear that the Privacy Act issue was in fact tried with the implicit consent of the parties, even though not referred to as such. The issue was fully litigated

at trial, and all relevant evidence adduced. Moreover, the Court has required supplemental filings to give the parties an opportunity to focus specifically on the Privacy Act claim. It thus appears that no unfair prejudice will result to defendant from granting the motion to amend. Consequently, in the interest of justice, the accompanying Order will grant plaintiff's motion to amend the complaint to include her Privacy Act claim.

II.

The facts regarding plaintiff's Privacy Act allegation are generally undisputed. After the first altercation between plaintiff and her coworker, Idalene Price, Price complained to the agency EEO officer, Ernest Hawkins.

Defendants' Supplemental Proposed Findings of Fact and Conclusions of Law Regarding Privacy Act Claim (DPFF) at 1 (filed Nov. 8, 1985). In the course of her conversation with Hawkins, Price identified fellow employees who had witnessed recent manifestations of alleged harassment of Price by plaintiff. Id. Hawkins then requested that those witnesses, Barbara Kae Sidle, Terence McCormick and Howard Norseth, prepare a written description of their observations. Id. at 1-2. Hawkins did not make a similar request of plaintiff. Plaintiff's Supplemental Proposed Findings of Fact and Conclusions of Law Regarding Privacy Act Claim (PPFF) at ¶ 6 (filed Nov. 21, 1985). Hawkins received copies of each of these memoranda and

stored them in his desk drawer. DPFF at 2. In April, 1982, a second altercation between plaintiff and Price occurred. Id. A few days after this event Price lodged an official grievance against plaintiff, alleging harassment over a period of time. Id. An informal investigation by the Office of Personnel ensued, and Hawkins turned over to the investigator the memoranda he had stored in his desk drawer. Id. The memoranda were then incorporated into the investigator's file, and were made available to plaintiff in June, 1982. Id. at 2-3. Plaintiff then filed a response to the investigator's report. Id. at 3. The result of the investigation was that Price's grievance was sustained, and on June 16, 1985,

plaintiff received a letter of admonishment, directing her to cease harassing Price. Id. The report of investigation referred to the memoranda written by plaintiff's coworkers and provided by Hawkins thus:

> Ms. Lawrence denies all allegations of harassment. She claims that it is she that's [sic] being harassed. . . . In view of the comments made by most of her colleagues, her denial and claim is not considered fully supportable.
>
> . . . .
>
> The incidents of harassment described in grievant's memorandums . . . are essentially correct. Ms. Lawrence harassed the grievant by chiding the grievant with direct confrontation, accusations, vocal tones, and nonverbals. The complaint is substantiated by other division employees and former supervisor.

PPFF at ¶ 11 (citing PX 239 at p. 2.). In July, 1982, plaintiff filed a grievance alleging violations of the Privacy Act. Plaintiff's grievance was denied in October, 1982. DPFF at 3.

Defendant maintains that no Privacy Act violation occurred because plaintiff was:

> duly furnished copies of the memoranda by the investigator and she thereafter had an opportunity to rebut the assertions before any decision on the Price grievance was made. Consequently, plaintiff was accorded notice and opportunity to comment on memoranda once they were referenced in connection with a prospective personnel action relating to her.

DPFF at 7. But, this is not the law. In the making and keeping of records, the Privacy Act requires an agency to:

> maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.

5 U.S.C. § 552a(e)(5). The Act further provides that when an agency:

> fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; . . . the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

5 U.S.C. § 552(a)(g)(1)(C).

The Privacy Act does not prohibit private note-taking by an employee's supervisor, but those notes must either be kept private and used only to refresh the supervisor's memory, or placed in the employee's file in a timely manner. Chapman v. National Aeronautics and Space Admin., 682 F.2d 526, 529 (5th Cir. 1982). Absent timely incorporation into the employee's file, the private notes may not be used as the basis for an adverse employment action. Belatedly affording the employee "notice and opportunity to comment on memoranda once they were referenced in connection with a prospective personnel action relating to her," DPFF at 7, does not cure the Privacy Act violation. According to the court in Chapman:

> We cannot accept the district court's conclusion that "Chapman had an opportunity to refute or correct every aspect of the evidence the agency relied on in his removal." In reality, Chapman's [plaintiff's] opportunity to rebut the contents of Phinney's [plaintiff's supervisor's] memoranda written, for example, in the summer of 1975, did not arise until July of 1977. During the interim, Chapman was not aware of the private notes. Absent actual notice or some reference to the existence or contents of the notes in Chapman's personnel file, it cannot be said that the records were fairly and properly maintained, for Chapman was not alerted timely to the existence of potentially derogatory data. Under section 552a(e)(5), NASA's [plaintiff's employer's] use of the personal notes lacked, at the very minimum, the timeliness of incorporation into NASA records necessary to assure fairness.

682 F.2d at 529.

A recent case decided by this District Court is not to the contrary.

There, plaintiff charged that a negative performance evaluation "was based upon . . . 'secret documents' made available to his rating superior." Kalmin v. Department of the Navy, 605 F. Supp. 1492, 1494 (D.D.C. 1985). But the court found otherwise, noting:

> The declarations of Kalmin's [plaintiff's] coworkers who made "personal notes" about him state unequivocally that the notes were made for the sole purpose of refreshing the writer's memory; were either maintained at their homes, in miscellaneous private files at work, or in chronological logs or diaries; were never circulated; and were never under Navy [the employer's] control and could have been discarded at will in the writer's sole discretion.

605 F. Supp. at 1494-95.

Here, defendant does not dispute that the notes were created over a year

before plaintiff had notice that they existed, and that the notes themselves were used by the agency in reaching an employment decision adverse to plaintiff. The notes were thus not incorporated into plaintiff's file in a timely manner and the situation falls squarely within the prohibition established by Chapman.

For relief, plaintiff originally sought "simply the expungement of the file." Tr. 6/28 at 98. In her supplemental filing, plaintiff asks for damages in the amount of $1000 under section 552a(g)(4). This section, however, requires the court to find that the agency's violation of the Privacy Act was willful or intentional. Such a finding is not justified in this case. While it was a violation of the Privacy Act for the

agency to rely, in the making of an employment decision adverse to plaintiff, upon the personal notes not timely incorporated in the employee's file, the agency did give plaintiff an opportunity, albeit belatedly, to respond to her accusers. This fact, while not curing the Privacy Act violation, militates against a finding that the violation was willful or intentional. The most appropriate relief is that originally asked for by plaintiff -- expungement of the file. The court has the power to order this relief where it is necessary to vindicate plaintiff's rights. 5 U.S.C. § 552a(g)(2)(A); Keeffe v. Library of Congress, No. 84-5464, slip op. at 8 (D.C. Cir. Dec. 3, 1985); Chastain v. Kelley, 510 F.2d 1232, 1235-36 (D.C. Cir.

1975). The accompanying Order will direct defendant to expunge all records relating to admonishment of plaintiff on June 16, 1982, and to refrain from basing any personnel decisions on this admonishment.

* * *

Also pending is plaintiff's Motion For Order to Show cause Why Sanctions Should Not Be Imposed For Failing to Cooperate With Discovery, Including Misleading the Court as to the Existence of a Discoverable Document (filed Sept. 5, 1985). As the basis for this motion, plaintiff claims that testimony of Hawkins at trial establishes that he had in his files at the time of plaintiff's discovery request a document relevant to

plaintiff's case written by Sidle which the agency did not produce in discovery.

Defendant's Opposition and the affidavits attached thereto (filed Sept. 20, 1985) demonstrate that no such document ever existed. Affidavit of Barbara Kae Sidle at ¶ 2; Affidavit of Ernest Hawkins at ¶¶ 4, 5. The accompanying Order will thus deny plaintiff's motion for an order to show cause. Plaintiff also filed a motion for limited and expedited discovery relating to her motion to show cause. The accompanying Order will deny this motion as moot.

Date: _____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANIS LAWRENCE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 83-2876
ELIZABETH DOLE,	)	
	)	
Defendant.	)	
	)	

ORDER

For the reasons stated in the accompanying Memorandum, it is this ____ day of December, 1985, hereby

ORDERED: that defendant shall expunge all records relating to the admonishment of plaintiff on June 16, 1982, and shall refrain from basing any personnel decision on this admonishment; and it is further

ORDERED: that plaintiff's motion for an order to show cause why sanctions

should not be imposed should be, and hereby is, DENIED; and it is further

ORDERED: that plaintiff's motion for limited and expedited discovery should be, and hereby is, DENIED as moot; and it is further

ORDERED: that this entire action should be, and hereby is, DISMISSED.

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 86-5007

JANIS M. LAWRENCE,

v. CA No. 83-02876

ELIZABETH DOLE, Secretary
of Transportation, et al.

BEFORE: WALD, Chief Judge; MIKVA, Circuit Judge and GESELL*, District Judge, U.S. District Court for the District of Columbia

ORDER

Upon consideration of appellant's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Rule 28 U.S.C. Section 292(a).

STATUTES AND RULES OF CIVIL PROCEDURE

1. 5 U.S.C. § 552a

(g)(1) Civil remedies--Whenever any agency

* * *

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts shall have jurisdiction in the matters under the provisions of this subsection.

* * *

(4) In any suit brought under the provisions of subsection (g)(1)(C) and (D) of this section in which the court determines that the agency acted in a manner which was intentional or

willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

2. 29 U.S.C. § 206(d)

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishmetn at a rate less than the rate at whihc he pays wages to emplopyees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any other factor other than sex; Provided, That an employer who is paying a wage rate

differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

3. 42 U.S.C. § 2000e-16. Employment by Federal Government

(a) All personnel actions affecting employees or applicants for employment . . . in executive agencies as defined by section 105 of Title 5 . . . , shall be made free from any discrimination based on race, color, religion, sex, or national origin.

4. FEDERAL RULES OF CIVIL PROCEDURE
Rule 41. Dismissal of Actions

* * *

(b) Involuntary Dismissal; Effect thereof. . . .
After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment

until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). . . .

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .